United State of America	)	P-014
	)	
v.	)	Ruling on Government Motion
	)	for a Continuance
Ahmed Mohammed Ahmed Haza	)	
Al Darbi	)	19 May 2009

---

1. I have reviewed and considered:

a. The government motion, with attachments, for a continuance, dated 15 May 2009.

b. The Commission's previous continuance order, dated 13 February 2009.

c. The Commission's docketing order, dated 27 April 2009.

2. Law. Once the Convening Authority has referred a case to trial by Military Commission, Congress and the Secretary of Defense have invested in the Military Judge the sole authority to grant continuances. (Military Commission Act, 10 U.S.C. §949e; Rule for Military Commission (R.M.C.) 706(b)(4)(E)(i)).

3. Discussion.

a. IAW R.M.C. 707(b)(4)(E)(ii)(A), a continuance should be granted only if Military Judge specifically finds that the interests of justice are served by granting a continuance and those interests outweigh the best interests of the public and the accused in a prompt trial.

b. On 13 February 2009, the Commission granted the government a continuance until 20 May 2009 to permit the new Administration to review Military Commissions and the disposition of individual detainees. As a result of that review, the Administration has proposed a number of changes in the Military Commissions to take effect on 14 July 2009. The Administration is also considering other potential reforms and anticipates completing the Detention Policy Review by 21 July 2009.

c. The government has requested a second 120 day continuance to complete its review and implement changes. The defense has not filed a response, but the government's motion states that the defense does not oppose this continuance.

d. In its order setting 27 May 2009 for the next session, the Commission stated, "In setting this date, the Commission is not trying to influence the Administration's review. If there are changes between now and 27 May 2009, the Commission will consider adjusting/cancelling the hearing." There are now proposed changes which would significantly impact further proceedings. As such, good cause exists to postpone the next session in this case.

4. I find:

a. The requested delay in the next hearing is until 24 September 2009.

b. On its face, the request to delay the next hearing is reasonable.

c. Granting the continuance will serve the interests of justice because it will permit the Administration time to implement changes, complete the Detention Policy Review, and finish its review of individual cases. A continuance until 24 September 2009 is a reasonable time to accomplish these actions.

d. The best interests of both the public and of the accused in a prompt trial will be not harmed by the requested delay of the next hearing, and are outweighed by the reasons for granting the requested continuance.

e. For purposes of R.M.C. 707(b)(4)(E)(ii)(B), the government is responsible for the delay from 20 May 2009 until 24 September 2009.

5. The government request for a continuance in the next hearing until 24 September 2009 is GRANTED.

6. The next hearing will be held at 0900 hours on 25 September 2009. Parties will be prepared to litigate all outstanding issues at that time. The Commission reserves the right to issue interlocutory orders and conduct pretrial proceedings, if necessary, during the continuance period. The Commission is concerned that the granting of this second long continuance will result in the parties having done nothing to prepare this case for trial for eight months. The Commission expects that once this continuance expires, both sides will be fully prepared to expeditiously litigate this case, and both sides will have fully complied with their discovery obligations during the period of the continuance. The Commission recognizes the logistical challenges of conducting hearings in this case. As such both sides should ensure not to schedule any conflicts with the hearing date.

7. The Commission authorizes the public release of this order and supporting pleadings.

So ordered this 19th day of May, 2009.

//signed//
JAMES L. POHL
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

AHMED MOHAMMED AHMED HAZA AL DARBI

GOVERNMENT MOTION

For Appropriate Relief

15 May 2009

1. **Timeliness**: This motion is timely filed.

2. **Relief Requested**: In the interests of justice, the Government respectfully requests the Military Commission grant an additional 120-day continuance of the proceedings in the above-captioned case, until 24 September 2009.[1]

3. **Overview**: A second continuance is in the interests of justice, and, given the circumstances, outweighs the interests of both the public and the accused. On 22 January 2009, the President ordered comprehensive reviews of detention policy (including military commissions), and of all the individual detainees at Guantanamo (including the accused in this military commissions case). Those reviews are not yet complete, but significant progress has been made. The President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo (attachment G). As a first step, and as a result of the Detention Policy Task Force's initial work, on 15 May, 2009 the Secretary of Defense published and notified Congress of five significant proposed changes to the Manual for Military Commissions (attachment D), including rules that would exclude all statements obtained by the use of cruel, inhuman or degrading treatment, impose additional conditions on the use of hearsay, and provide the accused greater latitude in the selection of counsel. As required by law, however, proposed modifications to the procedures in effect in military commissions cannot take effect for 60 days from 15 May. The Administration is committed to taking further steps to ensure that commissions are part of an overall system that best protects U.S. national security and foreign policy interests while also insisting that justice is done in the case of every single detainee. These steps will include working with the Congress now and in the future to reform our military commissions system to better serve those purposes. The Administration will shortly be proposing legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366, not only to make the five rule changes noted above statutory, but also to make other significant changes to the commissions, including revising the rules governing classified evidence and further revising the rules regarding the admissibility of evidence. We anticipate that these

[1] The Government is seeking similar 120-day continuances in the other pending military commissions cases.

changes will nevertheless permit cases pending before commissions to proceed, though no decisions have yet been made as to which specific detainees will continue to be prosecuted before commissions or whether they might be prosecuted in Article III courts, or whether some alternative disposition of the detainees might be recommended. Given all this, the Government submits that the interests of the public and the defendant would not be served by denying the continuance in this case.

4. **Burden and Persuasion**: As the moving party, the Government bears the burden of persuasion. RULE FOR MILITARY COMMISSIONS (R.M.C.) 905(c), MANUAL FOR MILITARY COMMISSION (MMC), 2007.

5. **Facts**:

a. On 22 January 2009, the President issued Executive Order (E.O.) 13492, "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities" (attachment A). This E.O. directed an inter-agency review of "the status of each individual currently detained at Guantánamo." E.O. 13492, §4(a). The review participants[2] were tasked, first, to "determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States," and second, in the cases of those individuals not approved for release or transfer, "to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution . . ." *Id.* at §4(c)(2)-(3).

b. E.O. 13492 also directed the Secretary of Defense to "ensure that during the pendency of the Review . . . all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered . . . are halted." *Id.*, § 7 (emphasis added).

c. On 22 January 2009, the President also issued E.O. 13493, "Review of Detention Policy Options" (attachment B). E.O. 13493 established a Detention Policy Task Force co-chaired by the Attorney General and the Secretary of Defense, "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." E.O.13493, § 1(e) The E.O. directs that this Task Force complete its work in 180 days (i.e. by 21 July 2009). *Id.* at §1(d).

---

[2] E.O. 13492 directed that the following officers participate in the review: The Attorney General, the Secretaries of Defense, State, and Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and such other officers or employees of the United States as determined by the Attorney General. E.O. 13492, §4(b).

d. Consistent with the President's order that steps be taken sufficient to halt military commissions during the pendency of the review, the Secretary of Defense ordered that no new charges be sworn or referred to commissions, and directed the Chief Prosecutor of the Office of Military Commissions to seek continuances of 120 days in all cases that had been referred to military commissions (attachment C).

e. In accord with that direction, on 23 January 2009, the Government sought a continuance in the above-captioned case until 20 May 2009, which the court granted on 13 February 2009. Pursuant to the Commission's docketing order, this matter was continued to 27 May 2009.

f. In compliance with E.O. 13492, the Detainee Review Task Force is actively considering detainees' cases. It has made recommendations resulting in decisions to transfer or release more than 30 individuals. The status of the defendant[s] in the above-captioned case is under active consideration by one of the Task Force's Detainee Review Teams, which will make a recommendation on the disposition of the defendant to the principals appointed by the President pursuant to E.O. 13492 (attachment A). Under E.O. 13492, the Secretary of Defense must ensure that these proceedings are halted at least until that review is complete.

g. Further, as a result of the initial work of the Detention Policy Task Force, the Secretary of Defense has published five proposed changes to the Manual for Military Commissions (attachment D):

(1) Delete R.M.C. 202(b), MMC 2007, eliminating the dispositive effect, for purposes of jurisdiction for trial by a military commission under the M.C.A., of a prior determination by a Combatant Status Review Tribunal (or other competent tribunal) that an individual is an "unlawful enemy combatant."

(2) Revise R.M.C. 506, MMC 2007, to establish a right to "individual military counsel" of the accused's own choosing, provided the requested counsel is assigned as a defense counsel within the Office of the Chief Defense Counsel and is "reasonably available."

(3) Remove the language in the "Discussion" under MILITARY COMMISSION RULE OF EVIDENCE (M.C.R.E.) 301, MMC 2007, that directs the military judge to instruct the members they should consider the fact the accused did not subject himself to cross-examination when he offers his own hearsay statement at trial but does not testify.

(4) Prohibit the use of statements obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained. This would be accomplished by removing the distinction, in the standard for admissibility, between statements obtained before 30 December 2005 and those obtained on or after that date – which now potentially permits the admission of statements obtained by the use of cruel, inhuman or degrading treatment prior to 30 December 2005 – and applying the standard currently in M.C.R.E. 304(c)(2), MMC 2007, to all statements.

(5) Revise M.C.R.E. 803(c), MMC 2007 to give the proponent of hearsay that is not otherwise admissible under M.C.R.E. 803(a) the burden of demonstrating that a reasonable commission member could find the evidence sufficiently reliable under the totality of the circumstances to have probative value.

h. Pursuant to Section 949a(d) of Title 10, United States Code, the Secretary of Defense must inform the Committees on Armed Services of both the House and Senate of proposed modifications to the procedures in effect for military commissions at least 60 days before they go into effect.

i. The Secretary communicated these changes to the Armed Services Committees on 15 May 2009, and they are scheduled to go into effect on 14 July 2009.

j. The Administration also is working with the Congress on legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366 in order to codify these rule changes and to further change the law governing military commissions. Other significant changes being considered are revisions to the rules governing the use of classified information, further revisions of the rules concerning the admissibility of evidence, and adjustments to the class of individuals subject to the jurisdiction of the commissions.

k. In short, the interagency teams are actively engaged in a thorough assessment of all the issues directed for review by the President. However, at this point that work is not complete and, while much has been accomplished, the Government does not at this time know precisely how the military commissions will be reformed, or even what the disposition of this particular detainee will be, including whether he will be tried by military commission. As stated before, the review of this individual is not complete, and the 180-day Detention Policy Review is not due to be completed until July 21, 2009.

6. **Argument**:

a. Rule for Military Commissions (RMC) 707(b)(4)(E)(i) authorizes the military judge of a military commission to grant a continuance of the proceedings if the interests of justice are served by such action and outweigh the best interests of both the public and the accused in a prompt trial of the accused. For all of the reasons stated above, the Government submits that it would not serve the interests of justice or the defendant to deny the motion for continuance.

b. The requested continuance is in the interests of justice, as it will permit the President and his Administration to complete a thorough review of all pending cases and of the military commissions process as a whole.

c. The interests of justice served by granting the continuance outweigh the interests of both the public and the accused. Granting a continuance of the proceedings is in the interests of the accused and the public, as the Administration's review of the commissions process and its pending cases might result in changes that would (1) necessitate re-litigation of issues in this case; or (2) if the case were to proceed at some later date, produce legal consequences affecting the options available to the Administration and the accused. It would be inefficient and potentially unjust to deny the continuance motion in this case before there is a final decision to

proceed with this military commission—a commission that would, if resumed, proceed under a new set of rules.

d. Extending the continuance in this case for an additional 120 days, from 27 May until 24 September 2009, will permit adequate time for the Administration to complete its review of the military commissions process and of the pending cases, to take appropriate actions to implement the five rules changes noted above, and to work with the Congress to further revise and reform the commissions process to ensure that it best serves the national security and foreign policy interests of the United States and the interests of justice. The reason for seeking the requested delay, therefore, is not inconsistent with the interests of justice. To the contrary, it is intended to ensure the President has the time and opportunity to complete the policy and case-by-case reviews and to propose and implement changes to military commissions law and procedure, some of which will be best effected by legislation. In these circumstances, the additional delay of 120 days is not prejudicial to the defendants nor is it inconsistent with the interests of the public.

7. Scope of Request: Questions have arisen concerning the scope and effect of continuances that the Government has sought and that the judges have granted in commissions cases. The Executive Order directs the Secretary to take steps "sufficient to halt the proceedings," and it was in accord with that obligation that the Secretary directed the Chief Prosecutor to seek the continuances that are now in place.[3]

The United States wishes to clarify the scope of the continuances that it now seeks. The Government does not seek to preclude the parties from submitting any filings, if they wish. The purpose of this motion is, in effect, to preserve the status quo as it existed on January 22, 2009 and as it exists on this date, and to preclude any unnecessary judicial decisions on contested questions until the President decides whether and on what terms, and as to which accused, the military commissions will resume. For that reason, the Government is asking the court not to take any actions in the case—whether or not any "sessions" of court are involved—with the exception of any rulings the court must make (including a ruling on the instant motion itself) in order to preserve the status quo as of this date to the greatest practicable extent.

---

[3] The Government's previous motions requesting continuances did not attempt to define the scope of the requested continuance; but in some cases, military judges have defined the scope of the continuance in ordering it. In the case against Ahmed Khalfan Ghailani, for instance, the continuance issued by the military judge expressly contemplated that discovery by the parties would continue, and that the judge would continue to take certain actions that do not require a "session." *See* Ruling on Government Motion for Continuance, *United States v. Ghailani* (Feb. 13, 2009). Similarly, in the case against the five charged September 11th co-conspirators, *United States v. Khalid Sheikh Mohammed*, the military judge recently issued a ruling (in response to a defense motion for relief related to the submission to the court of a document by the defendants) in which he assumed the prosecutors had not sought—and the military judge, in his earlier ruling on the continuance, had not ordered—"a 'halt' to any and all actions related to this case, but merely on the record hearings with counsel, the accused, and the military judge." The military judge concluded that his ruling was consistent with the prosecution's request and his earlier grant of a continuance, because "[s]ince recessing on 21 January 2009, the military judge has not called the Military Commission *into session*." Order on Defense Motion for Special Relief, *United States v. Mohammed* (Mar. 18, 2009) (emphasis added). *See* R.M.C. 905(h) (providing that the military judge may dispose of written motions without a session of the commission).

8. **Conclusion**: For the foregoing reasons, the military commission should extend the previously granted continuance of further proceedings in the above-captioned case until 24 September 2009, and adopt the attached Findings of Fact, Conclusions of Law and Order. (Attachment E). Additionally, this delay should be excluded when determining whether any period under Rule for Military Commission (RMC) 707(a) has run.

9. **Oral Argument**: The Government does not request oral argument, but is prepared to argue should the commission find it helpful.

10. **Witnesses and Evidence**: No witnesses. The Government respectfully requests the commission to consider the attachments to this motion as evidence of the asserted facts.

11. **Certificate of Conference**: The Government notified the Defense of the requested relief and the Defense did not object.

12. Attachments:

A. E.O. 13492
B. E.O. 13493
C. Secretary of Defense Order on Military Commissions (Jan. 20, 2009)
D. Amendments to Manual for Military Commissions, 2007
E. Proposed Findings of Fact and Conclusions of Law
F. Olsen Declaration
G. Martins and Wiegmann Declaration

13. Submitted by:

Respectfully Submitted,

/s/

Frank G. Rangoussis, Department of Justice
Scott A. Bryant, CPT, JA, USA
Office of Military Commissions
Office of Chief Prosecutor

ATTACHMENT A

Presidential Documents

Executive Order 13492 of January 22, 2009

Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. *Definitions.* As used in this order:

(a) "Common Article 3" means Article 3 of each of the Geneva Conventions.

(b) "Geneva Conventions" means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

(c) "Individuals currently detained at Guantánamo" and "individuals covered by this order" mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. *Findings.*

(a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.

(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

(c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals

have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention.

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.

(e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.

(f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109–366, as well as of the military commission process more generally.

Sec. 3. *Closure of Detention Facilities at Guantánamo.* The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. *Immediate Review of All Guantánamo Detentions.*

(a) **Scope and Timing of Review.** A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

(b) **Review Participants.** The Review shall be conducted with the full cooperation and participation of the following officials:

(1) the Attorney General, who shall coordinate the Review;

(2) the Secretary of Defense;

(3) the Secretary of State;

(4) the Secretary of Homeland Security;

(5) the Director of National Intelligence;

(6) the Chairman of the Joint Chiefs of Staff; and

(7) other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

(c) **Operation of Review.** The duties of the Review participants shall include the following:

(1) **Consolidation of Detainee Information.** The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) **Determination of Transfer.** The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) **Determination of Prosecution.** In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) **Determination of Other Disposition.** With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) **Consideration of Issues Relating to Transfer to the United States.** The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. *Diplomatic Efforts.* The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. *Humane Standards of Confinement.* No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

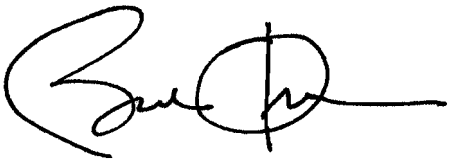
Sec. 7. *Military Commissions.* The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Sec. 8. *General Provisions.*

(a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 22, 2009.

[FR Doc. E9–1893
Filed 1–26–09; 11:15 am]
Billing code 3195–W9–P

ATTACHMENT B

Presidential Documents

Executive Order 13493 of January 22, 2009

Review of Detention Policy Options

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to develop policies for the detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations that are consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. *Special Interagency Task Force on Detainee Disposition.*

(a) **Establishment of Special Interagency Task Force.** There shall be established a Special Task Force on Detainee Disposition (Special Task Force) to identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.

(b) **Membership.** The Special Task Force shall consist of the following members, or their designees:

(i) the Attorney General, who shall serve as Co-Chair;

(ii) the Secretary of Defense, who shall serve as Co-Chair;

(iii) the Secretary of State;

(iv) the Secretary of Homeland Security;

(v) the Director of National Intelligence;

(vi) the Director of the Central Intelligence Agency;

(vii) the Chairman of the Joint Chiefs of Staff; and

(viii) other officers or full-time or permanent part-time employees of the United States, as determined by either of the Co-Chairs, with the concurrence of the head of the department or agency concerned.

(c) **Staff.** Either Co-Chair may designate officers and employees within their respective departments to serve as staff to support the Special Task Force. At the request of the Co-Chairs, officers and employees from other departments or agencies may serve on the Special Task Force with the concurrence of the heads of the departments or agencies that employ such individuals. Such staff must be officers or full-time or permanent part-time employees of the United States. The Co-Chairs shall jointly select an officer or employee of the Department of Justice or Department of Defense to serve as the Executive Secretary of the Special Task Force.

(d) **Operation.** The Co-Chairs shall convene meetings of the Special Task Force, determine its agenda, and direct its work. The Co-Chairs may establish and direct subgroups of the Special Task Force, consisting exclusively of members of the Special Task Force, to deal with particular subjects.

(e) **Mission.** The mission of the Special Task Force shall be to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice.

(f) **Administration.** The Special Task Force shall be established for administrative purposes within the Department of Justice, and the Department of Justice shall, to the extent permitted by law and subject to the availability of appropriations, provide administrative support and funding for the Special Task Force.

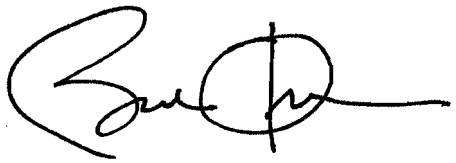
(g) **Report.** The Special Task Force shall provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, on the matters set forth in subsection (d) within 180 days of the date of this order unless the Co-Chairs determine that an extension is necessary, and shall provide periodic preliminary reports during those 180 days.

(h) **Termination.** The Co-Chairs shall terminate the Special Task Force upon the completion of its duties.

Sec. 2. *General Provisions.*

(a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 22, 2009.

[FR Doc. E9–1895
Filed 1–26–09; 11:15 am]
Billing code 3195–W9–P

ATTACHMENT C

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JAN 20 2009

MEMORANDUM FOR THE CONVENING AUTHORITY FOR MILITARY COMMISSIONS
CHIEF PROSECUTOR, OFFICE OF MILITARY COMMISSIONS

SUBJECT: Military Commissions

Pursuant to the Military Commissions Act of 2006 and the authority vested in me as the Secretary of Defense, I hereby direct the Convening Authority for Military Commissions to cease referring cases to military commissions immediately. I direct the Chief Prosecutor of the Office of Military Commissions (OMC) to cease swearing charges, to seek continuances for 120 days in any cases that have already been referred to military commissions, and to petition the Court of Military Commission Review to hold in abeyance any pending appeals for 120 days.

This is to provide the Administration sufficient time to conduct a review of detainees currently held at Guantanamo, to evaluate the cases of detainees not approved for release or transfer to determine whether prosecution may be warranted for any offenses these detainees may have committed, and to determine which forum best suits any future prosecution.

This order does not preclude continued investigation or evaluation of cases by the OMC.

cc:
General Counsel of the Department of Defense
Chief Judge, Military Commissions Trial Judiciary
Chief Defense Counsel, Office of Military Commissions

ATTACHMENT D

FIVE CHANGES TO MILITARY COMMISSION RULES

In brief, the changes are:

1. Remove references to the Combatant Status Review Tribunal within Rule for Military Commission 202 and specify that a commission is a "competent tribunal" for purposes of determining the jurisdictional predicate;

2. Remove the discussion section within Military Commission Rule of Evidence 301, which directs the military judge to instruct commission members to consider that the accused did not subject himself to cross-examination if the accused introduces his own hearsay statements at trial but does not testify;

3. Modify Military Commission Rule of Evidence 304 to render inadmissible all evidence the judge deems to have been secured as a result of cruel, inhuman, or degrading treatment within the meaning of the Detainee Treatment Act;

4. Provide for a right of individual military counsel in Rule for Military Commissions 506, permitting a right to counsel of choice within the office of the Chief Defense Counsel;

5. Modify Military Commission Rule of Evidence 803(c) to reverse the burden of proof regarding hearsay statements from a requirement that the opponent establish unreliability to a requirement that the proponent establish reliability.

1. *Remove references to the Combatant Status Review Tribunal within Rule for Military Commission 202.*

Rule for Military Commissions (R.M.C.) 202 currently states that a finding by a Combatant Status Review Tribunal ("CSRT") or by another "competent tribunal" is dispositive for purposes of jurisdiction for trial by military commission, as provided in 10 U.S.C. § 948d. In practice, however, CSRTs determine whether an individual is an "enemy combatant," not whether an individual is an "unlawful enemy combatant." In the military commission case against Salim Ahmed Hamdan, the military judge decided that the CSRT's findings were insufficient to establish jurisdiction, because the CSRT decided enemy combatant status, not unlawful enemy combatant status. The commission made its own determination that Hamdan was an "unlawful enemy combatant," thereby satisfying the jurisdictional predicate required by the MCA. In doing so, it concluded that the commission was an "other competent tribunal established under the authority of the President or the Secretary of Defense," the finding of which as to unlawful enemy combatant status is dispositive for purposes of jurisdiction under 10 U.S.C. § 948d and R.M.C. 202. This proposed rule modification would eliminate the rule text that provides that a CSRT determination of "unlawful enemy combatant" status is dispositive for jurisdictional purposes and would establish that a military commission is a "competent tribunal" to determine that the accused is an unlawful enemy combatant and thus subject to commission jurisdiction.

R.M.C. 202(b) would, therefore, read as follows (the areas crossed through would be deleted; areas underlined would be added):

Rule 202. Persons subject to the jurisdiction of the military commissions

(a) *In general.* The military commissions may try any person when authorized to do so under the M.C.A.

(b) *Competent Tribunal.* A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

~~(b) *Determination of unlawful enemy combatant status by Combatant Status Review Tribunal or other competent tribunal dispositive.* A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the M.C.A. The determination by the tribunal shall apply for purposes of military commission jurisdiction without regard to any pending petitions for review or other appeals.~~

Discussion

Military commissions have personal jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. A military commission is a competent tribunal to make a finding sufficient for jurisdiction. *See* 10 U.S.C. § 948a(1)(ii) and § 948d(c). ~~The M.C.A. recognizes, however, that with respect to individuals detained at Guantanamo Bay, the United States relies on the Combatant Status Review Tribunal ("C.S.R.T.") process to determine an individual's combatant status. The C.S.R.T. process includes a right of appeal to the United States Court of Appeals for the District of Columbia Circuit. Because the C.S.R.T. process provides detainees with the opportunity to challenge their status, the M.C.A. recognizes that status determination to be dispositive for purposes of the personal jurisdiction of a military commission. The M.C.A. provides that an individual is deemed an unlawful enemy combatant for purposes of the personal jurisdiction of a military commission if the individual has been determined to be an unlawful enemy combatant by a C.S.R.T. or other competent tribunal. Where combatant status of the accused may otherwise be relevant, the parties may establish the accused's status by evidence adduced in accordance with the commission rules. The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government's obligation to prove beyond a reasonable doubt the elements of each substantive offense charged under the M.C.A. and this Manual.~~

~~*Combatant Status Review Tribunal.* The M.C.A. provides that an alien determined to be an unlawful enemy combatant by a C.S.R.T. shall be subject to military commission jurisdiction, whether the C.S.R.T. determined was made "before, on, or after the date of the enactment" of the M.C.A. *See* 10 U.S.C. § 948a(1)(ii). At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an "enemy combatant" if he "was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners." The United States previously determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.~~

~~*Other Competent Tribunal.* The M.C.A. also provides that an individual shall be deemed an "unlawful enemy combatant" if he has been so determined by a competent tribunal established consistent with the law of war. *See* 10 U.S.C. § 948a(1)(ii).~~

~~The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.~~

(c) *Procedure.* The jurisdiction of a military commission over an individual attaches upon the swearing of charges.

2. *Remove the discussion section within Military Commission Rule of Evidence 301 that directs the military judge to instruct members to be wary of hearsay statements offered by an accused who does not testify.*

Military Commission Rule of Evidence ("M.C.R.E.") 301 addresses the privilege against self-incrimination that applies in military commission proceeding. Although a defendant before a commission is privileged from testifying against himself, the discussion section of the rule directs that if the defendant offers his own prior hearsay statements but does not testify at the proceeding, the military judge "shall instruct" the members of the commission that they may consider the fact that the accused chose not to be cross-examined on the hearsay statements, and that his statements are not sworn testimony. The proposed rule change would eliminate the requirement of this instruction and leave the issue of instructions to the discretion of the military judge. M.C.R.E. 301 would read (deletions are crossed through):

Rule 301. Privilege concerning compulsory self-incrimination

* * * * *

(e) *Waiver by the accused.* When an accused testifies voluntarily as a witness, the accused thereby waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for two or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified.

~~**Discussion**~~

~~If the accused voluntarily introduces his own prior hearsay statements through the direct examination of a defense witness, but the accused exercises his right not to testify himself at the proceeding, the military judge shall instruct the members prior to the beginning of their deliberations: "The accused has the absolute right to testify as a witness or to choose not to testify in this proceeding. That the accused exercised (his)(her) right not to testify should not be held against (him)(her). However, in this case, the accused has voluntarily offered his prior statements as part of (his)(her) defense by eliciting those statements through other defense witnesses. At the same time, the accused, by electing not to testify in the proceeding, has prevented the Government from subjecting those statements to cross-examination. In evaluating the weight to be accorded to the accused's hearsay statements, you may consider the fact that the~~

~~accused chose not to be cross-examined on those statements and that those statements were not sworn testimony."~~

3. *Remove the distinction between pre- and post-Detainee Treatment Act statements analyzed for coercion.*

Under M.C.R.E. 304(c), the admissibility of statements allegedly obtained through coercion depends upon satisfaction of certain criteria, which differ depending on whether the statements were obtained before or after December 30, 2005, the date of enactment of the Detainee Treatment Act ("DTA"). M.C.R.E. 304(c) provides that a judge may admit an allegedly coerced statement made ***before*** the effective date of the Detainee Treatment Act only if the military judge finds that the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence. By contrast, a military judge may admit a statement made ***after*** the effective date of the Detainee Treatment Act only if he or she finds that the statement is reliable and sufficiently probative, that the interests of justice would best be served by admission of the statement into evidence, *and* that the interrogation methods used to obtain the statement did not amount to cruel, inhuman or degrading treatment.

The proposed rule change would eliminate the difference in the criteria for the admissibility of statements made before and after December 30, 2005. As amended, M.C.R.E. 304(c) would provide that in *all* cases where the degree of coercion used to obtain a statement is disputed, a military judge may admit the statement only if he or she finds that it was not obtained using interrogation methods that constitute cruel, inhuman, or degrading treatment (and if the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence).

The applicable portions of M.C.R.E 304(c) would read as follows (deletions are crossed through):

Rule 304. Confessions, admissions, and other statements

(a) *General rules.*

* * * * *

(b) *Definitions.*

* * * * *

(c) *Statements allegedly produced by coercion.* When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted if ~~in accordance with this section~~.

(1) ~~As to statements obtained before December 30, 2005, the~~

~~military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.~~

~~(2) As to statements obtained on or after December 30, 2005, t~~ the military judge ~~may admit the statement only if the military judge~~ finds that (i) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;
(ii) the interests of justice would best be served by admission of the statement into evidence; and (iii) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment as defined in section 1003(d) of the Detainee Treatment Act, Pub. L. 109-148 (2005) (codified at 42 U.S.C. 2000dd(d)

4. ***Provide for a right of individual military counsel, permitting a right to counsel of choice within the office of the Chief Defense Counsel***

Rule for Military Commissions 506 establishes the right of the accused to be represented by civilian counsel, if provided at no cost to the government, and detailed defense counsel. However, the rules currently do not provide for a right of "individual military counsel" ("IMC")—military counsel of the defendant's selection—as provided in the rules for courts-martial (Rule for Courts-Martial 506). An accused before a military commission who desires to request a military defense counsel other than the one detailed to him has no basis in the existing rules for the request. The proposed rule would permit the accused to make such a request, but to accommodate the unique nature of commissions, the group of officers available to act as IMC would be limited to those officers already detailed to the Office of Military Commissions.

Rule for Military Commissions 506, in pertinent part and as rewritten, would be as follows (the areas underlined would be added):

Rule 506. Accused's rights to counsel

(a) *In general.* The accused has the right to be represented before a military commission by civilian counsel if provided at no expense to the Government, and <u>by either</u> the defense counsel detailed <u>or by military counsel of the accused's own selection, if reasonably available.</u> The accused is not entitled to be represented by more than one military counsel.

Discussion

See R.M.C. 502(d)(3) for determining qualifications for civilian defense counsel. See R.M.C. 502(d)(6) and 505(d)(2) concerning the duties and substitution of defense counsel. These rules and this Manual do not prohibit participation on the defense team by consultants not expressly

covered by section (d) of this rule, as provided in such regulations as the Secretary of Defense may prescribe, subject to the requirements of Mil. Comm. R. Evid. 505.

(b) Individual Military Counsel

(1) Reasonably available. Counsel are not reasonably available to serve as individual military counsel unless detailed to the Office of Military Commissions to perform defense counsel duties when the request is received by the Office.

(2) Procedure. Subject to this section, the Secretary may prescribe procedures for determining whether a requested person is "reasonably available" to act as individual military counsel. Requests for individual military counsel shall be made by the accused or the detailed defense counsel with notice to the trial counsel. If the requested person is not reasonably available under this rule, the Chief Defense Counsel shall deny the request and notify the accused. If the requested counsel is not among those listed as not reasonably available in this rule, the Chief Defense Counsel shall make an administrative determination whether the requested person is reasonably available. This determination is a matter within the sole discretion of that authority.

5. *Reverse the burden of proof regarding hearsay statements from a requirement that the opponent establish unreliability to a requirement that the proponent establish reliability.*

Currently, M.C.R.E. 803 requires a person opposing the admissibility of a hearsay statement to bear the burden of establishing that the statement is unreliable. The proposed rule change would shift the burden to require the proponent of hearsay evidence to establish its reliability, as is generally the norm in U.S. courts and as provided in the rules of evidence governing courts-martial. The change would also eliminate an apparent discrepancy between the rule text and the discussion, which states that the proponent of a statement "still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403." While hearsay admissibility remains much broader than in domestic courts, the expansive admissibility standard would be consistent with international standards, such as those employed in international criminal tribunals.

As currently drafted, Military Commission Rule of Evidence 803 provides in pertinent part:

* * * * *

(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted if the party opposing the admission of the evidence demonstrates by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances.

Discussion

The M.C.A. recognizes that hearsay evidence shall be admitted on the same terms as other evidence because many witnesses in a military commission prosecution are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death. Because hearsay is admissible on the same terms as other evidence, the proponent still has the burden of demonstrating that the evidence is admissible under Mil. Comm. R. Evid. 401 and 403.

As modified, the rule would read:

(c) Hearsay evidence otherwise admissible under subsection (b)(1) shall not be admitted unless the proponent of the evidence demonstrates by a preponderance of the evidence that the evidence is reliable under the totality of the circumstances.

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 15 2009

The Honorable Carl Levin
Chairman, Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with section 949a(d) of the Military Commissions Act of 2006 ("MCA"), attached please find the proposed modifications to procedures for military commissions under the MCA. As required by the MCA, I have consulted with the Attorney General prior to prescribing these procedures and rules for cases triable by military commission.

cc:
The Honorable John McCain
Ranking Member

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

MAY 15 2008

The Honorable Ike Skelton
Chairman, Committee on Armed Services
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In accordance with section 949a(d) of the Military Commissions Act of 2006 ("MCA"), attached please find the proposed modifications to procedures for military commissions under the MCA. As required by the MCA, I have consulted with the Attorney General prior to prescribing these procedures and rules for cases triable by military commission.

cc:
The Honorable John M. McHugh
Ranking Member

ATTACHMENT E

UNITED STATES OF AMERICA

v.

AHMED MOHAMMED AHMED HAZA AL DARBI

Proposed Findings of Fact, Conclusions of Law and Order

15 May 2009

1. On January 22, 2009, the President issued Executive Order 13493, establishing a Special Interagency Task Force on Detainee Disposition ("Detention Policy Task Force" or "Task Force") "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice."

2. The Task Force has been directed to provide a report to the President, through the Assistant to the President for National Security Affairs and Counsel to the President, by 21 July 2009.

3. The President ordered the Secretary of Defense to take action to halt all commission proceedings while the Task Force review took place. The Secretary of Defense directed the Chief Prosecutor of the Office of Military Commissions to seek 120-day continuance in any case that had been referred to military commission in order to provide the Administration sufficient time to conduct the review. On 13 February 2009, pursuant to a Government motion to continue (P-012), this court granted a continuance until 27 May 2009.

4. After reviewing the briefs of the parties, and the entire record, the Military Commission finds the following facts:

a. The Task Force review is not yet complete, but significant progress has been made. The President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo.

b. Pursuant to Section 949(d) of Title 10, United States Code, the Secretary of Defense must inform the Committees of the Armed Services of both the House and Senate of proposed modifications to the procedures in effect for military commissions. The proposed modifications to the procedures cannot take effect for 60 days.

c. As a first step, and as a result of the Detention Policy Task Force's initial work, on 15 May 2009, the Secretary of Defense published and notified Congress of five significant changes to the Manual for Military Commissions. The changes submitted on 15 May 2009 will go into effect on 14 July 2009.

d. Conducting further proceedings in this case during the continued Review and upcoming changes in the rules governing military commissions could result in expending effort and resources

to litigate issues that might later be rendered moot or that might need to be re-litigated due to changes in the rules or procedures, or might otherwise produce legal consequences affecting the options available to the Administration in its Review.

5. Based upon the foregoing facts, the Military Commission reaches the following conclusions of law:

a. Continuing the proceedings in this case until 24 September 2009 is in the interests of justice because it will permit the President to make the proposed changes to the rules governing military commissions and it will save this case from conducting proceedings that might be affected by rule changes.

b. A 120-day continuance during the rule change review period is in the interests of both the public and the accused, because it will avoid wasted effort in litigating issues that might be rendered moot or might need to be re-litigated by the outcome of that Review, thereby advancing judicial economy, and preventing legal consequences that might affect the options available to the Administration as part of its Review. Changes in the military commission procedures that could result from a Review of the commissions process might inure to the benefit of the accused

c. The interests of justice served by a 120-day continuance in this case outweigh the best interests of both the public and the accused in a prompt trial.

d. The Government has not requested this continuance for the purpose of obtaining unnecessary delay, or for any other inappropriate reason.

e. The Government's continuance request is for an appropriate period of time in light of the rule changes and the statutorily required review period.

f. This delay should be excluded when determining whether any time period under Rule for Military Commission (R.M.C.) 707(a) has run.

6. Wherefore, it is this __ day of May 2009, by this military commission

ORDERED:

1. That further proceedings in this military commission are continued until 24 September 2009.

2. During the pendency of this continuance the requirements of previously ruled upon motions are stayed, compliance dates will be readjusted appropriately, and all other proceedings in this case will be halted.

3. That all delay between today and 24 September 2009 shall be excluded when determining whether any time period under R.M.C. 707(a) has run.

Military Judge

ATTACHMENT F

DECLARATION OF MATTHEW G. OLSEN

Pursuant to 28 U.S.C. § 1746, I, Matthew G. Olsen, hereby declare:

1. I am the Executive Director of the Guantanamo Review Task Force ("Task Force") and Special Counselor to the Attorney General. I was appointed to these positions by the Attorney General on February 20, 2009. Prior to this appointment, I served as a Deputy Assistant Attorney General in the Department of Justice's National Security Division and, more recently, as Acting Assistant Attorney General for National Security. The statements made herein are based on my personal knowledge and information made available to me in my official capacity.

2. The Task Force was created in accordance with Executive Order 13,492, titled "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities." See Exec. Order No. 13,492, 74 Fed. Reg. 4897 ("Executive Order"). The Executive Order, signed January 22, 2009, directs the closure of the Guantanamo Bay detention facility within one year of the date of the order. Id. § 3. To that end, the Executive Order requires "a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at [Guantanamo Bay]" to determine whether each detainee can be transferred or released, prosecuted for criminal conduct, or provided another lawful disposition consistent with "the national security and foreign policy interests of the United States and the interests of justice." Id. at §§ 2(d).

3. Section Four of the Executive Order establishes the framework by which this review is to be conducted. The participants to the review are identified as the Attorney General, who shall coordinate the review, the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Chairman of the Joint Chiefs of Staff, and any other officers or employees of the United States as determined by the Attorney General, with the concurrence of the head of the department or agency concerned. Id. at §§ 4(b).

4. Pursuant to his responsibility to coordinate the review mandated by the Executive Order, the Attorney General established the Guantanamo Review Task Force in late February 2009. The Task Force's responsibilities include assembling and examining relevant information and making recommendations regarding the proper disposition of each individual currently detained at Guantanamo Bay.

5. Specifically, the Task Force is responsible for making recommendations to determine on a rolling basis and as promptly as possible, with respect to the individuals currently detained at Guantanamo, whether it is possible to transfer or release those individuals consistent with the national security and foreign policy interests of the United States, and if so, whether and how the Secretary of Defense may effect their transfer or release. Further, in the cases of those detainees who are not approved for release or

transfer, the Task Force must make recommendations whether the federal government should seek to prosecute those individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution. Finally, with respect to any individuals currently detained whose disposition is not achieved through transfer, release, or prosecution, the Task Force must make recommendations for other lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.

6. The Task Force consists of members from various agencies, including the Department of Defense, the Department of State, the Department of Justice, the Department of Homeland Security, and various elements of the intelligence community. To date, the Task Force has assembled a staff of approximately 50 persons (excluding administrative staff). They are currently grouped into two types of teams for purposes of conducting the reviews of individual detainees mandated by the President's Executive Order: (1) transfer/release teams, responsible for determining whether detainees should be recommended for transfer or release; and (2) prosecution teams, responsible for determining whether the government should seek to prosecute detainees, including whether it is feasible to prosecute detainees in Article III courts. These teams prepare written recommendations in consultation with me, and I submit the recommendations to a Review Panel composed of senior-level officials. The Review Panel members are authorized to decide the disposition of Guantanamo detainees.

7. The work of the Task Force is ongoing. In accordance with the Executive Order, we are making recommendations and decisions on a rolling basis in a manner consistent with certain priorities we have identified since late February. These priorities include detainees subject to court orders from habeas litigation, diplomatic efforts, and detainees facing charges in the military commissions. No final decisions have yet been made whether to continue to prosecute detainees currently charged in the military commission system before the commissions or whether to prosecute these individuals in Article III courts.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 14, 2009.

Matthew G. Olsen

ATTACHMENT G

DECLARATION OF
MR. J. BRADFORD WIEGMANN AND COL MARK S. MARTINS

Pursuant to 28 U.S.C. § 1746, we, J. Bradford Wiegmann and Mark S. Martins, hereby declare:

1. On January 22, 2009, the President issued Executive Order 13493, establishing a Special Interagency Task Force on Detainee Disposition ("Detention Policy Task Force" or "Task Force") "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice."

2. The Detention Policy Task Force is co-chaired by the Attorney General and the Secretary of Defense, or their designees, and includes the Secretaries of State and Homeland Security, the Director of National Intelligence, the Director of the Central Intelligence Agency, and the Chairman of the Joint Chiefs of Staff, or their designees.

3. Mr. J. Bradford Wiegmann is a career attorney at the United States Department of Justice, and currently serves as the Principal Deputy and Chief of Staff in the National Security Division. He has also been designated by the Attorney General as Co-Chair of the Detention Policy Task Force.

4. Colonel Mark S. Martins is judge advocate on active duty in the United States Army, assigned as Chief of the International and Operational Law Division of the Office of the Judge Advocate General of the Army. He has also been selected by the Secretary of Defense and the Attorney General to serve as member and Executive Secretary of the Detention Policy Task Force.

5. The Task Force has been directed to provide a report to the President, through the Assistant to the President for National Security Affairs and the Counsel to the President, by July 21, 2009.

6. The Task Force has assembled a staff, which Mr. Wiegmann and Colonel Martins jointly lead and supervise, of 18 U.S. Government employees, consisting of legal and operational personnel from the relevant national security agencies with expertise in all matters pertaining to its work ("Task Force Staff").

7. The Task Force has established an office at the Department of Justice and has formally requested detailed information from the relevant U.S. Government agencies in a number of areas germane to its work, including information relevant to an assessment of the terrorist threat, basic data on detainees currently or previously held by the United States, and information on existing authorities, practices, and policies with respect to the apprehension and detention of suspected terrorists.

8. The Task Force has met seven times, has developed a detailed plan to accomplish its mission, and is hard at work on the issues it is charged with addressing. Six interagency subgroups of the Task Force meet at least weekly with the Task Force Staff to address more than 20 discrete, but closely interrelated, issues. Formal liaison relationships have been established with the companion task forces established under Executive Orders 13491 and 13492.

9. In addition, the Task Force has begun a series of consultations with Congress and Congressional staff, and with diverse stakeholders and experts within and beyond the Executive Branch, in order to gain the benefit of those who have worked with and studied the complex national security, foreign policy, and legal issues associated with the Task Force's comprehensive mandate.

10. The Task Force review is not yet complete, but significant progress has been made. We have been advised that the President has decided to work to reform substantially and retain military commissions as one available and appropriate forum, along with Article III courts, for the prosecution of detainees at Guantanamo and others who may be apprehended in the future.

11. As a first step, and as a result of the Detention Policy Task Force's initial work, on 13 May 2009 the Secretary of Defense published and notified Congress of five significant proposed changes to the Manual for Military Commissions, including rules that would exclude all statements obtained by the use of cruel, inhuman or degrading treatment, impose additional conditions on the use of hearsay, and provide the accused greater latitude in the selection of counsel. As required by law, however, proposed modifications to the procedures in effect in military commissions cannot take effect for 60 days from 13 May.

12. As directed by the President, we plan to take further steps to improve military commissions as part of a broader justice system that best protects U.S. national security and foreign policy interests while also serving the interests of justice. These steps will include working with the Congress on legislation to reform our military commissions system to better serve those purposes.

13. We have been advised that the Administration will shortly be proposing legislation to amend the Military Commissions Act of 2006, Pub. L. 109-366, not only to make the five rule changes noted above statutory, but also to make other significant changes to the commissions, including among others revising the rules governing classified evidence, further revising the rules regarding the admissibility of hearsay evidence, and adjusting the class of individuals subject to the jurisdiction of the commissions.

14. We anticipate that these changes will nevertheless permit cases pending before commissions to proceed, though no decisions have yet been made as to which specific detainees will continue to be prosecuted before commissions, whether they might be

prosecuted in Article III courts, or whether some alternative disposition of the detainees might be recommended.

Each of us declares under penalty of perjury that the foregoing is true and correct. Executed on 13 May 2009.

J. BRADFORD WIEGMANN

MARK S. MARTINS